Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JEAN F. TRIGALET, et al.,

Petitioners,

v.

M. WARRICK, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States District Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a reckless police vehicle pursuit initiated and carried on wantonly and in deliberate disregard of the lives and safety of innocent third party motorists gives rise to a 42 U.S.C. §1983 claim against the officers for deprivation of life without due process as guaranteed by the substantive due process clause of the Fourteenth Amendment when the pursued vehicle crashes into a third party motorist, killing her.

2. Whether the defendant officers were entitled to qualified immunity from such a claim arising on May 6, 1990.

LIST OF PARTIES

Plaintiffs-Appellees below were Jean F. Trigalet and Myra J. Trigalet, as personal representatives of the estate of Constance Trigalet. Defendant-Appellants below were M. Warrick; H.G. Stege and D. Pierce.

Also defendants in the district court but not involved in any appeal were Terry Young; Dick Crawford; Rodger Randle; Drew Diamond; Robert Dick; Robert H. Gardner; T.G. Jones; Robert N. Dick; Ollie Harris; Vic Seal; Robert Chance; B.D. Gardner; S.H. Emmons; M. Goins; E.E. Compos; D.L. Christy; John Fleak; R. Plunk; S. Willis; Tulsa Police Department; and The City of Tulsa.

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No. _____

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JEAN F. TRIGALET, et al.,

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Petition For A Writ Of Certiorari To The United States District Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Jean F. Trigalet and Myra J. Trigalet respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court filed its Order of Dismissal March 30, 1993 and related Judgment April 5, 1993. These are included in the Appendix at App. 11 and App. 13 respectively. The district court reconsidered its earlier order and filed its order vacating the order of dismissal in part,

denying qualified immunity to the officers participating in the pursuit and reinstating plaintiffs' claims against those defendants only November 23, 1993. The Order is included in the Appendix at App. 14. The Opinion of the Court of Appeals reversing the trial court was filed May 2, 1995, is reported at 54 F.3d 645 (10th Cir. 1995) and is included in the Appendix at App. 1. The Order of the Court of Appeals denying rehearing was filed June 6, 1995 and is included in the Appendix at App. 9.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1995. Rehearing was denied June 6, 1995. This Court has jurisdiction under 28 U.S.C. §1254(1). Jurisdiction in the Court of Appeals was based upon *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985).

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides at section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due**

> **process of law**; nor deny to any person within its jurisdiction the equal protection of the laws."

(Emphasis added.)

Title 42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT AND INTRODUCTION OF THE CASE

A. Factual Background

This 42 U.S.C. §1983 civil rights action was filed by Petitioners Jean and Myra Trigalet as personal representatives of the estate of their daughter Constance Trigalet. Constance was killed May 6, 1990 when a stolen van driven by a thirteen year-old boy struck her vehicle during a high-speed police chase. The pursuit, which took place on a Saturday night, began around midnight when City of Tulsa, Oklahoma police officers observed two vans traveling together which they suspected were stolen. When the officers activated their emergency

lights, one of the vans pulled over but the other van sped up and fled, pursued by the police.

During the initial pursuit through a residential area, the vehicles reached speeds of 60-65 mph and the van ran at least eight stop signs. The officer lost sight of the van, which was later observed to be running without headlights. As a second officer began pursuit, the chase headed toward three major Tulsa intersections. The vehicles reached speeds of up to 80 mph and proceeded at a speed in excess of 70 mph across two major thoroughfares. Although the van did not slow down at these intersections, the traffic lights at the first two happened to be green when the vehicles came through. The pursuit continued at speeds of 80 mph to the third intersection, where the van ran a red light and collided with the vehicle in which the decedent was riding.

Petitioners brought this action in the United States District Court for the Northern District of Oklahoma. Petitioners contend the Tulsa police officers used unnecessary and excessive force in a reckless police vehicle pursuit with deliberate indifference to the lives and safety of the users of the streets of the City of Tulsa and consequently denied Constance Trigalet her right to life as part of the substantive due process clause of the Fourteenth Amendment to the U.S. Constitution.

B. Proceedings Before the District Court and the Court of Appeals

Shortly after the case was filed in the district court, the defendants filed a Motion to Dismiss, Alternative Motion for Summary Judgment and a Supplement to the

same. Although plaintiffs sought time within which to complete discovery, discovery was limited pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982), in the interests of the officers who argued they were entitled to qualified immunity; and plaintiffs were directed to respond to the motion.

The district court ordered the case dismissed March 30, 1993 and Judgment was entered April 5, 1993. Upon timely Motion to Reconsider of plaintiffs, the district court vacated its Order of Dismissal in part, holding the pursuing officers Warrick, Stege and Pierce were not entitled to qualified immunity and allowing plaintiffs' actions to proceed against these officers only.

The pursuing officers appealed to the United States Circuit Court of Appeals for the Tenth Circuit. Jurisdiction for their appeal was based upon *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985) wherein this Court held a denial of qualified immunity directly appealable before a final Judgment is entered. Plaintiffs could not cross appeal the dismissal of the case against the remaining defendants. F.R.Civ.P.54(6) and F.R.A.P. 4(a) and 4(a)(7).

On May 2, 1995, the Tenth Circuit held that although it was clearly established on May 6, 1990 that recklessness could give rise to a cause of action under 42 U.S.C. §1983, it was not clearly established on May 6, 1990 that an officer could be held liable for injuries caused by a fleeing suspect. The Tenth Circuit held the defendant pursuing officers were, therefore, entitled to qualified immunity and the decision of the trial court was reversed.

Additionally, it should be noted that the district court action which gives rise to this Petition, was a consolidated action. District court cases on behalf of Martha Annette Trigalet and Steven Lewis Munson, were brought as well. Annette and Steve were riding in the same vehicle with Constance when she was killed. They too were killed as a result of the reckless pursuit. Qualified immunity was denied to defendant officers Warrick, Stege and Pierce in all three cases but the officers chose to appeal only this case.

REASONS FOR GRANTING THE PETITION

THE TENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A. Reckless Acts of Municipal Police Officers That Lead to the Foreseeable Death of a Citizen Violate the Due Process Clause of the Fourteenth Amendment.

In this civil rights action under 42 U.S.C. §1983, the Tenth Circuit has held that it was clearly established on May 6, 1990 that recklessness could give rise to such an action for deprivation of life without due process of law as guaranteed by the substantive due process clause of the Fourteenth Amendment to the U.S. Constitution. *Harris v. Maynard*, 843 F.2d 414 (10th Cir. 1988); *Archuleta v. McShan*, 897 F.2d 495 (10th Cir. [March 1,] 1990).

In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662 (1986) this Court specifically left open the

question of whether recklessness or grossly negligent conduct by one acting under color of law triggered the protection of the Due Process Clause of the Fourteenth Amendment. 106 S.Ct. at 666 n.3. The Tenth Circuit Court of Appeals in *Harris v. Maynard*, 843 F.2d 414 (10th Cir. 1988) concluded that recklessness, obdurate disregard or deliberate indifference to the right to life does violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 416.

In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court established that deliberate indifference to a prisoner's serious medical needs is cruel and unusual punishment. 97 S.Ct. at 291. The Tenth Circuit simply concluded in *Harris* supra, that the Fourteenth Amendment affords no less protection than the Eighth Amendment. *Harris* at 416.

Petitioners urge this Court to grant this Petition and hold, as the Tenth Circuit does, that recklessness, obdurate disregard and deliberate indifference to the right to life triggers the Due Process Clause of the Fourteenth Amendment and that because the Tenth Circuit decisions of *Harris v. Maynard*, supra, and *Archuleta v. McShan*, supra, preceded the police pursuit and death in this case, such was the clearly established law on May 6, 1990 for purposes of this case.

B. Where Injury To and/or Death of Bystander Citizen is a Foreseeable Consequence of Officer's Reckless Conduct, Fact that Officer Did Not Directly Cause Death is Not Bar to 42 U.S.C. §1983 Action Against Officer.

Although the Tenth Circuit held that reckless conduct of an officer violates the Fourteenth Amendment Due

Process Clause where that conduct causes injury or death and such was the clearly established law on May 6, 1990, it granted the officers in this case qualified immunity anyway. The Appeals Court held it was not clearly established on May 6, 1990 that an officer could be held liable for "an injury caused not by the officer but by a suspect being chased by the officer." *See* App. 7. Petitioners contend this is where the Tenth Circuit errs.

It is elementary legal principle that one is liable for injuries to another when his act is a proximate cause of the other's injuries. Proximate cause is found where the consequences of an act are foreseeable. It was foreseeable that a reckless police pursuit posed grave danger to third party motorists like Constance Trigalet – danger from the speeding police cruisers and danger from the fleeing suspect. Certainly this black letter law of foreseeability was clearly established by May 6, 1990. The very definition of recklessness as stated by the Tenth Circuit in March, 1990 in *Archuleta v. McShan*, presumes foreseeability. The court stated: reckless conduct is conduct "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow [and] conscious indifference to the consequences". *Archuleta* at 499.

The City of Tulsa Police Department pursuit policy itself acknowledges that its officers can be held responsible for injuries proximately caused by them. The policy in effect on May 6, 1990 stated: "Each officer must make the decision whether or not to enter into a pursuit in each individual situation, considering that he may be criminally and civilly responsible for his actions."

In 1976, this Court held in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 that failing to perform a legally required act or showing deliberate indifference stated a claim under 42 U.S.C. §1983. 97 S.Ct. at 291. In *Estelle* a prisoner alleged prison officials had violated the cruel and unusual punishments clause of the Eighth Amendment by failing to provide him adequate medical treatment. The U.S. Supreme Court cases of *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed. 2d 677 (1986) and *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed. 2d 632 (1983) also involved injuries caused by third parties.

Also prior to 1990, several other circuit courts of appeal had held that police inaction or deliberate indifference to the consequences of action may be the basis for §1983 claims. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) ("If the state puts a man in position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit.") *White v. Rochford*, 592 F.2d 381 (7th Cir. 1989) (officer left children alone on roadside in inclement weather – court held the officer's "indifference in the face of known dangers" actionable under 42 U.S.C. §1983). *Nishiyama v. Dickson County, TN*, 814 F.2d 277 (6th Cir. 1987) (officers practice of allowing inmate-felon to use official patrol car in reckless indifference to risks posed to citizens was actionable under 42 U.S.C. §1983). *Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988) and on *reh'g* 879 F.2d 583 (9th Cir. 1989) (officer left woman alone beside roadway in high crime area of city after impounding the vehicle in which she was riding and arresting driver – court held officer's

recklessness or deliberate indifference stated claim under 42 U.S.C. §1983).

In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987) this Court held that "clearly established" does not mean that the very action in question need be previously held unlawful, only that the unlawfulness must be apparent in light of preexisting law. 107 S.Ct. at 3039.

In assessing the clearly established law on May 6, 1990, the Tenth Circuit should have considered the black letter law of foreseeability and should have looked to this Court's and other federal appellate courts' decisions which address officer liability under §1983 for inaction and conduct of others.

This Court should grant certiorari in this case and hold that the defendant officers in this case are not entitled to qualified immunity because it was clearly established on May 6, 1990 that injuries proximately caused by an officer acting under color of law recklessly and in conscious disregard of known risks was actionable under 42 U.S.C. §1983.

CONCLUSION

This Petition for Writ of Certiorari of Jean and Myra Trigalet on behalf of their deceased daughter Constance Trigalet should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEAN F. TRIGALET and MYRA J. TRIGALET, Personal Representatives of the Estate of CONSTANCE TRIGALET,

Plaintiffs-Appellees,

v.

TERRY YOUNG; DICK CRAWFORD; ROGER RANDLE; DREW DIAMOND; ROBERT DICK; ROBERT H. GARDNER; T.G. JONES; ROBERT N. DICK; OLLIE HARRIS; VIC SEAL; ROBERT CHANCE; D.B. GARDNER; S.H. EMMONS; M. GOINS; E.E. COMPOS; D.L. CHRISTY; JOHN FLEAK; R. PLUNK; S. WILLIS; TULSA POLICE DEPARTMENT; CITY OF TULSA,

Defendants,

and

M. WARRICK; H.G. STEGE; D. PIERCE,

Defendants-Appellants.

No. 94-5006
(D.C. No. 92-C-368-E)
(N.D. Okla.)

(Filed May 2, 1995)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. NO. 92-C-368-E)

Submitted on the Briefs:

David L. Pauling, City Attorney, and Michael C. Romig, Assistant City Attorney, Tulsa, Oklahoma, were on the brief for Defendants/Appellants.

Jack B. Sellers and Jessie Huff Durham, Jack B. Sellers Law Assoc., Inc., Sapulpa, Oklahoma, were on the brief for Plaintiffs/Appelles.

Before **SEYMOUR**, Chief Judge, **McKAY**, and **BALDOCK**, Circuit Judges.

SEYMOUR, Circuit Judge.

The personal representatives of Constance Trigalet (Trigalets) brought this action under 42 U.S.C. § 1983 against the City of Tulsa and three Tulsa police officers. The decedent was killed when a stolen van, pursued at high speeds by defendant officers, ran a red light and struck the vehicle in which she was a passenger.[1] The Trigalets alleged, *inter alia*, that defendants deprived the decedent of her Fourteenth Amendment right to substantive due process, and deprived her family of their right to intimate familial association. The district court granted summary judgment for the City of Tulsa, but denied it to defendant officers. The court held that the officers were not entitled to qualified immunity on the Trigalets' substantive due process claim upon concluding that, at the

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[1] Two other passengers riding in the Trigalet vehicle were killed. Lawsuits brought on behalf of these decedents were consolidated below and qualified immunity was denied in all three cases. Defendant officers have chosen to appeal only in this case.

time of the incident, the law was clearly established that the officers' conduct could give rise to such a constitutional violation. The officers appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We reverse.[2]

I.

The decedent was killed on May 6, 1990, when a stolen van driven by a thirteen year-old boy struck her vehicle during a high-speed police chase. The pursuit, which took place on a Saturday night, began shortly before midnight when officers observed two vans traveling together which they suspected were stolen. The officers followed the vans while they confirmed that one of them was indeed stolen. When the officers activated their emergency lights, one of the vans pulled over but the other van sped up and fled, pursued by the police.

During the initial pursuit through a residential area, the vehicles reached speeds of 60-65 mph and the van ran at least eight stop signs. The officer lost sight of the van, which was later observed to be running without headlights. As a second officer began pursuit, the chase headed toward three major Tulsa intersections. The vehicles reached speeds of up to 80 mph and proceeded at a speed in excess of 70 mph across two major thoroughfares. Although the van did not slow down at these

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[2] The parties waived oral argument. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

intersections, the traffic lights at the first two happened to be green when the vehicles came through. The pursuit continued at speeds of 80 mph to the third intersection, where the van ran a red light and collided with the vehicle in which the decedent was riding.

The Trigalets alleged that the three defendant officers involved in the chase: 1) used unnecessary force in the pursuit, thereby denying the decedent her Fourth Amendment right to be free from unreasonable seizure; 2) acted with deliberate indifference to the rights of innocent bystanders such as decedent, thereby denying her right to due process; and 3) acted with deliberate indifference to the rights of the families of these innocent bystanders, thereby denying decedent's parents, children, and siblings their right to intimate familial association with the deceased.

The district court originally granted summary judgment against the Trigalets on all claims against all defendants. Upon the Trigalets' motion to reconsider, the court reassessed its judgment in light of *Medina v. City of Denver*, 960 F.2d 1493 (10th Cir. 1992), and other authority. It reaffirmed its dismissal in favor of the City of Tulsa, but vacated its judgment in favor of the three defendant officers on the claim that their reckless conduct denied the decedent substantive due process. The court concluded that the officers were not entitled to qualified immunity because the law under which defendants actions could form the basis of a constitutional claim became clearly established on March 1, 1990, when this court rendered its decision in *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990). Although the district court

did not specifically reaffirm on reconsideration its dismissal of the familial association claim, it impliedly did so by explicitly stating that its prior order of dismissal would stand except for the claim based on reckless conduct as it relates to a due process violation.[3]

II.

We turn to defendants' argument that they are entitled to qualified immunity with respect to the Trigalets' substantive due process claim.

> Once a defendant pleads qualified immunity, the plaintiff initially bears a heavy two-part burden. First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue. . . .
>
> If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity.

Albright v. Rodriguez, No. 94-2108, 1995 WL 170712, at *3-4 (10th Cir. April 7, 1995) (citations omitted). We held in Medina in 1992 that an officer might be found liable for

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[3] In their response brief on appeal, the Trigalets reassert their familial association claim. They did not cross-appeal on this issue, however, and we therefore have no jurisdiction to consider the district court's grant of summary judgment to defendants. In any event, the Trigalets' argument is foreclosed by our decision in *Trujillo v. Board of Cty. Comm'rs*, 768 F.2d 1186 (10th Cir. 1985).

injury caused by a fleeing suspect if the officer "was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." 960 F.2d at 1496. We need not determine whether the facts asserted by the Trigalets satisfy this standard, however, because we conclude that the standard was not clearly established in May 1990, and the Trigalets therefore failed to satisfy the second prong of the two-part test.

An official is protected from personal liability unless his allegedly unlawful official action was objectively legally unreasonable when assessed in light of legal rules that were clearly established when the action was taken. *See Chapman v. Nichols*, 989 F.2d 393, 397 (10th Cir. 1993).

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that *in the light of pre-existing law the unlawfulness must be apparent.*

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citation omitted) (emphasis added).

We must therefore ascertain whether it was clearly established on May 6, 1990, that reckless conduct could give rise to a due process claim under section 1983 and that an officer could be liable for injury caused by a fleeing suspect to a member of a definable group, as opposed to the public at large. "Ordinarily, in order for the law to be clearly established, there must be a Supreme

Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina*, 960 F.2d at 1498.

Turning first to the state of the law on reckless conduct, this circuit had clearly held by May 1990 that recklessness could form the basis for a due process violation. As we observed in *Medina*, 960 F.2d at 1498, we had so clarified our position in two cases decided prior to the events giving rise to this suit. *See Archuleta*, 897 F.2d at 499 (10th Cir. Mar. 1, 1990); *see also Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) ("wanton or obdurate disregard of" or "deliberate indifference to" prisoner's Fourteenth Amendment rights violates § 1983).

We must also ascertain, however, whether it was clearly established in May 1990 that a police officer could be liable under section 1983 for an injury caused by a third party. More specifically, as articulated in *Medina*, the relevant inquiry is whether, under the state of the law, it was clear that an officer "could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer." 960 F.2d at 1498.

In *Medina* we concluded it was not clearly established in 1986 that an officer could be held liable under these circumstances, observing that the plaintiff had cited no Tenth Circuit or Supreme Court case on point. *Id.* We have found no opinion decided between 1986 and 1990 holding that an officer could be held liable under section 1983 to a third party injured as a result of police chasing a fleeing felon. Although we recognize that the very conduct need not have previously been held unlawful, the

Trigalets have cited no case, nor have we found one, that is sufficiently analogous to the facts here to persuade us that the law became clearly established before *Medina* was decided in 1992. Accordingly, we conclude that the Trigalets have not satisfied their burden with respect to defendants' assertion of qualified immunity, and we reverse the district court's determination to the contrary.

The judgment of the district court denying defendants' motion for summary judgment on the issue of qualified immunity is REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEAN F. TRIGALET, MYRA J. TRIGALET, and CONSTANCE TRIGALET, Plaintiffs-Appellees,	)	No. 94-5006
v.	)	
M. WARRICK, H. G. STEGE, and D. PIERCE, Defendants-Appellants.	)	

ORDER

Filed June 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY and McKAY, Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having

requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Opal A. Carter
Opal Carter,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEAN F. TRIGALET, et al.,	)	
Plaintiffs,	)	Nos. 92-C-368-E
vs.	)	92-C-369-E
CITY OF TULSA, et al.,	)	92-C-370-E
Defendants.	)	(Consolidated)
	)	(Filed Mar. 30, 1993)

ORDER OF DISMISSAL

The Court has for consideration Defendants' Motions to Dismiss or, in the Alternative, for Summary Judgment (docket #8, #20, #33) and Plaintiff's Motion for Oral Argument (docket #52). The Court has studied the record and the applicable law and finds that because the law is so clear that 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments will not sustain a cause of action on the material facts presented herein, oral argument is unnecessary and Defendants' Motion for Summary Judgment should be granted. Reference is made to *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed. 623 (1989); *California v. Hodari*, 499 U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) and *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990) whose teachings are dispositive.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are granted; Plaintiff's Motion for Oral Argument is denied; the matter is dismissed; parties to bear their respective costs herein.

So ORDERED this 30th day of March, 1993.

/s/ James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEAN F. TRIGALET, et al.,	)	
	)	Nos. 92-C-368-E
Plaintiffs,	)	92-C-369-E
	)	92-C-370-E
vs.	)	(Consolidated)
CITY OF TULSA, et al.,	)	(Filed Apr. 5, 1993)
	)	
Defendants.	)	

JUDGMENT

This action came on before the Court, Honorable James O. Ellison, District Judge, and the issues having been duly considered and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiffs take nothing from the Defendants, that the action be dismissed on the merits, and that the parties bear their respective costs herein.

ORDERED this 5th day of April, 1993.

/s/ James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEAN F. TRIGALET, et al., Plaintiffs, vs. CITY OF TULSA, et al., Defendants.	)	Nos. 92-C-368-E
JEAN F. TRIGALET, et al., Plaintiffs, vs. CITY OF TULSA, et al., Defendants.	)	Nos. 92-C-369-E
LEONARD L. MUNSON, et al., Plaintiffs, vs. CITY OF TULSA, et al., Defendants.	)	Nos. 92-C-370-E (Consolidated) (Filed Nov. 23, 1993)

ORDER

Pursuant to the Order of the Circuit filed August 26, 1993, nunc pro tunc August 24, 1993, remanding the above-captioned consolidated cases to this Court, the Court has for consideration the motion of Jean F. Trigalet to Reconsider or Amend Judgment. The Court has

revisited the record and has reassessed its Order of Dismissal (docket #15) in light of *Medina v. City of Denver*, 960 F.2d 1493 (10th Cir. 1992) and other relevant authorities. The Court, again, elects to treat the pending dispositive motions as Motions for Summary Judgment. The Court finds that the Municipality's Vehicle Pursuit Policy neither authorized nor condoned reckless conduct during high speed police chases at the time relevant hereto. The Court further finds that there is no evidence that City police department officials named herein as party Defendants engaged in a course of conduct which exhibited, either through their policies or training or supervision, "a deliberate indifference to bystander safety during high speed chases." *Id.* at 1500-1501. Finally, the Court finds that the Defendant police officers in this case are not entitled to the defense of qualified immunity because the law in this Circuit that reckless conduct by police officers "could form the basis for a due process violation" under § 1983 became "clearly established" when the Tenth Circuit rendered its March 1, 1990 decision in *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990). The Court's prior Order of Dismissal will stand, in part; and is vacated in part. Plaintiffs' claims of recklessness against the officers who participated in the high speed chase at issue will not be dismissed.

So ORDERED this 19th day of November, 1993.

/s/ James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES
DISTRICT COURT

No. 95-341

Supreme Court, U.S.
FILED
SEP 23 1995
CLERK

In The
Supreme Court of the United States
October Term, 1995

JEAN F. TRIGALET, et al,
Petitioner,

vs.

M. WARRICK, et al,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Tenth Circuit correct in granting the Respondents, individual police officers, qualified immunity?

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For the Tenth Circuit

BRIEF IN OPPOSITION

Respondents, Officers M. Warrick, H. Stege, and D. Pierce, respectfully request that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

This case was brought in the Northern District of Oklahoma pursuant to 42 U.S.C. §1983. On March 30, 1993, the trial court granted summary judgment to all defendants. The order of the trial court was that the Respondents were entitled to qualified immunity. On November 23, 1993, the trial court vacated a portion of its previous order, denied the individual officers qualified immunity, and reinstated the lawsuit as to the Respondents. The Respondents appealed the reversal to the Tenth Circuit Court of Appeals.

The Tenth Circuit overturned the trial court's decision by opinion dated May 2, 1995. The Tenth Circuit's opinion is reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Two vehicles were observed by police officers, including defendant M. Warrick, traveling through a residential neighborhood under circumstances warranting a police field inquiry of both drivers at 12:05 a.m. Sunday, May 5, 1990. Officers of the Tulsa Police Department attempted to stop both vehicles. One vehicle was successfully stopped. (Appt. App. at 136-137). The second vehicle, identified as an "Astro van, tag number ICW-176," refused to stop and was pursued by a Tulsa officer. Police dispatchers immediately identified the vehicle to the officers as a stolen vehicle. (Appt. App. at 32).

The pursuit lasted approximately 2 minutes, 19 seconds, before the pursuing officer lost contact with the

vehicle on 2nd Street at Evanston Avenue. (Appt. App. at 32, 35-37). During the pursuit defendant Stege was monitoring its progress. Stege drove his car east from 3rd and Lewis Avenue toward the area where the original officer lost sight of the stolen vehicle, a distance of approximately one mile. (Appt. App. at 34-35, 53-55).

About thirty seconds after Officer Warrick lost sight of the stolen vehicle Officer Stege observed it run the stop sign at the intersection of 2nd Street and Delaware Avenue and turn south. The vehicle was being driven recklessly and at a high rate of speed. At the time Stege first spotted the vehicle he was at 3rd and Delaware, one block south. At that time Stege activated his emergency equipment, lights and siren. The driver turned west on 3rd Street. Stege then started his pursuit of the vehicle. (Appt. App. at 34-36, 46, 48-49, 56).

The second pursuit covered a distance of less than one and one half miles and lasted approximately fifty-two seconds. (Appt. App. at 32-33). The pursuit went through two major intersections guarded by traffic signal lights. Both the driver of the stolen vehicle and Stege drove through those intersections while the lights were green. (Appt. App. at 38-39, 50, 63). The speed of the stolen vehicle was estimated to be 60-80 m.p.h. The driver of the stolen vehicle did not slow for the intersections. Officer Stege did. (Appt. App. at 38-39, 42-44, 47-51, 57, 59, 62-65).

Stege was three blocks behind the stolen vehicle when its driver ran the red light at 3rd Street and Peoria Avenue and collided with the vehicle occupied by the decedents. The decedents' vehicle had been traveling south in the outside lane of Peoria. (Appt. App. at 44-45, 52, 57-58, 63). Stege had observed the light at that

intersection turn from green to red a few seconds before the driver of the stolen vehicle entered the intersection and strike the other vehicle. (Appt. App. 43-44, 52, 66-67).

REASONS FOR DENYING THE WRIT

The Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. A review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other Circuit Courts of Appeal.

THE LAW REGARDING LIABILITY OF A POLICE OFFICER FOR INJURY CAUSED BY A THIRD-PARTY DURING A HIGH SPEED PURSUIT WAS NOT CLEARLY ESTABLISHED ON MAY 6, 1990.

1. ELEMENTS OF QUALIFIED IMMUNITY

The test for qualified immunity is whether government officials, performing discretionary acts, violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In *Anderson v. Creighton*, 483 U.S. 635, 638-640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) this Court held that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The Court added the proviso that "(t)his is not to say that an

official's action is protected unless the very action in question has previously been held unlawful . . . but it is to say that in light of preexisting law the unlawfulness must be apparent." Once the issue of qualified immunity is raised the opposing party has the burden of showing the officers violated clearly established law. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

2. POLICE LIABILITY FOR INJURIES CAUSED BY A SUSPECT

Historically, the courts have applied the guarantee of due process provided by the Fourteenth Amendment to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L.Ed.2d 662, 668 (1996). The Court in *Daniels* did not decide "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 474 U.S. at 334.

In *Archuleta v. McShan*, 897 F.2d 495, 498 at nt. 6 (10th Cir. 1990) the Tenth Circuit held that "If, during the course of an arrest or other police action, the police direct action against a person who previously had bystander status with the requisite deliberateness to do injury to that person, his status would at that point change from one of a bystander to a direct object of state action. At that point, a due process claim could arise on behalf of such a person." The Tenth Circuit decided *Archuleta* two months before the acts leading to this case.

The Tenth Circuit dealt with the directedness issue again in *Medina v. City and County of Denver*, 960 F.2d

1493, 1406 (1992). There, the Tenth Circuit held a police officer involved in a pursuit violates a third-party's Fourteenth Amendment due process rights when the officer acts with "reckless indifference to the risk created and directs his actions toward the bystander." *Medina*, 960 F.2d at 1406. "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to the risk" created. *Medina*, 960 F.2d at 1496. The directedness component is met if "(1) the plaintiff is a member of a limited and specifically definable group, (2) the defendant's conduct specifically put members of that group at a substantial risk of serious, immediate, and proximate harm, (3) the risk was obvious or known, and (4) the defendant acted recklessly in conscious disregard of that known risk." *Medina*, 960 F.2d at 1496. The Tenth Circuit decided *Medina* two years after the acts leading to the present case occurred.

As stated above, the Tenth Circuit had concluded that recklessness could lead to a claim under 42 U.S. §1983 before the acts leading to this case. What the Tenth Circuit had not decided before May 6, 1990, was whether an officer "could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer." *Medina*, 960 F.2d 1498. In the case now before the Court, the Tenth Circuit determined the second issue was not clear until its decision in *Medina*. See Appendix to Petition For A Writ Of Certiorari, at App. 7.

It is unnecessary for the Court to address the first question presented by the Petitioner. That question involves the issue of whether recklessness and deliberately indifferent conduct, in the context of police pursuits, give rise to a claim under 42 U.S.C. §1983. Although other circuits that have adopted the "shocks the conscience"

standard in pursuit cases, the Tenth Circuit has adopted a reckless indifference standard the Tenth Circuit found it unnecessary to address the issue. *Webber v. Mefford*, 43 F.3d 1340, nt. 3 (10th Cir. 1994). The Tenth Circuit held in this case that "Although we recognize that the very conduct need not have previously been held unlawful, the Trigalets have cited no case, nor have we found one, that is sufficiently analogous top the facts here to persuade us that the law became clearly established before *Medina* was decided in 1992." Appendix to Petitioner's Petition For Writ of Certiorari at App. 7-8.

CONCLUSION

Further review of this case is not warranted. Accordingly, for the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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